

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

DEBRA K. KEACH and PATRICIA A. SAGE,)
)
Plaintiffs,)
)
vs.) CASE NO. 01-1168
)
U.S. TRUST COMPANY, N.A. f/k/a U.S. TRUST)
COMPANY OF CALIFORNIA, N.A., *et al.*,)
)
Defendants.)

**RESPONSE OF LYLE T. DICKES TO PLAINTIFFS’
CONSOLIDATED SUR-REPLY TO SUMMARY JUDGMENT MOTIONS**

Defendant, LYLE T. DICKES (hereinafter “Dickes”), by his attorneys, HUSCH & EPPENBERGER, LLC, respectfully submits his Response to Plaintiffs’ Consolidated Sur-Reply to Summary Judgment Motions.

I. INTRODUCTION

1. Following the filing of supplemental briefs as requested by this Court, concerning whether certain information attributable to James Hitchner could be considered part of the summary judgment record against Dickes and other Count IX Defendants whose motions were fully briefed, this Court ruled on January 13, 2003, that Plaintiffs would be permitted to file a Sur-Reply to those motions “limited solely to addressing their ‘rebuttal’ expert testimony as to the true value of F&G stock at the time of the ESOP transactions”¹ Plaintiffs exceed this

¹ Dickes would refer the Court to and assume familiarity with the BACKGROUND section of his January 9, 2003 filing. It sets forth a history of the matters related to expert disclosure and Hitchner’s report and deposition.

directive in their Sur-Reply by seeking to add opinions from Messrs. Bagley, Linke and Wolski. None of these individuals expressed an opinion as to actual value of the shares on the dates in question. Therefore, all parts of the Sur-Reply, except for references to Hitchner's report, must initially be stricken or ignored as not responsive to nor permitted by the January 13, 2003 Order.

Hitchner's report should also be stricken or given no consideration in connection with Dickes' summary judgment motion for a host of reasons. First, Hitchner's report was not timely disclosed, having not been submitted until well after the deadline for Plaintiffs' experts for their case-in-chief; use of such an untimely disclosed witness in "rebuttal," by a party allocated the burden of proof on an issue, is untenable. This argument applies to all Count IX defendants, irrespective of when their summary judgment motions were filed. Second, there is no proper basis for Hitchner's report in that it is dependent upon his conclusions as to sweepstakes risks, an area in which he has admitted that he has no experience, let alone expertise. Third, as U.S. Trust's January 9, 2003 Brief pointed out, Hitchner did not make his own independent analysis of actual value of the shares, nor has he even stated his own opinion on value.

Hitchner's report also has no bearing upon the "knew or should have known test," except to highlight again the total void in Plaintiffs' case against Dickes. Hitchner changed some of Robert Reilly's underlying assumptions, without ever establishing how someone in Dickes' position, many years ago, would have known or should have known that application of complex valuation techniques in 2003 by hired experts would at most produce a set of competing views as to what share values were in December, 1995 and June, 1997. Dickes should not be held to have actually or constructively known the value of those shares when years later, even with the benefit of hindsight, no agreement among retained experts can be reached. Instead, Dickes believed that the values of the shares were consistent with the known views of respected valuation firms

(Houlihan and Valuemetrics), more than or at least \$19.50 on December 20, 1995 and \$18.62 on June 30, 1997. (See Supplemental Affidavit of Lyle Dickes attached hereto).

Dickes' Motion should accordingly be granted on both grounds he has urged.

**II. DICKES' REPLY TO PLAINTIFFS' ADDITIONAL
CLAIMED MATERIAL FACTS.**

2. This Court only permitted Plaintiffs to address "rebuttal" expert testimony as to the true value of F&G stock at the time of the ESOP transactions. Paragraphs 2a-d of Plaintiffs' Sur-Reply do not provide evidence of the alleged true value of the shares. Dickes therefore objects to inclusion of these paragraphs as outside the scope of the January 13, 2003 Order and otherwise maintains they be considered immaterial to the question of whether Plaintiffs have provided any evidence of value in this record. Regarding paragraph 2e of the Sur-Reply, Dickes reiterates that this reference should not be considered for multiple reasons: (1) it is improper and untimely rebuttal testimony; (2) Hitchner's views are tied to his conclusions on sweepstakes risks, a subject on which he is not qualified to opine; and (3) Hitchner's report does not qualify as an opinion of value for reasons previously stated in U.S. Trust's January 9, 2003 Brief. The first sentence of paragraph 2a should not be considered either. It speaks again to the issue of sweepstakes risks. Hitchner's views thereon, without any expertise for so opining, have no basis in the record or applicable law. He lacks expertise in the particular field by his own admission. Any such opinion is therefore inadmissible under Rule 702 of the Federal Rules of Evidence and must be given no consideration.

3. Mr. Bagley's claimed opinions are completely immaterial to the question of actual value of the shares on December 20, 1995 and June 30, 1997. They are also outside the limited scope of the Court's January 13, 2003 Order. The matters set forth in paragraphs 3a-c of

Plaintiffs' Sur-Reply relate only to what a prudent buyer would or should have done. They have no materiality to Dickes as a seller of shares or actual share value.

4. Mr. Linke's asserted opinions as noted in paragraphs 4a.-d. of the Sur-Reply are immaterial to the question of true value and outside the parameters of this Court's January 13, 2003 Order, for reasons previously stated. He does not offer an opinion of actual value of the shares.

5. Mr. Wolski's testimony is again completely immaterial to the question at hand, as well as being outside the scope of the Court Order permitting Plaintiffs to file their Sur-Reply. Plaintiffs are seeking to bring into the record, way past the deadline for response to Dickes' summary judgment motion, references to materiality of risks, due diligence and other matters. These have no bearing upon or connection with the "true value" issue. This Court should strike or ignore Plaintiffs' attempt to add this immaterial evidence having no relationship to their case against Dickes.

III. APPLICABLE LAW

6 and 7. Plaintiffs cite Rule 703 and state an expert can rely on evidence if of a type reasonably relied upon by experts. Plaintiffs also note other experts' reports may be among the materials upon which an expert might in general reasonably rely. Dickes does not disagree with the recital of these general legal principles but questions their applicability here. Plaintiffs' Sur-Reply is flawed by not addressing other rules, namely Rule 26 (a) (2) of the Federal Rules of Civil Procedure and Rule 702 of the Federal Rules of Evidence. Rule 26 (a) (2) requires parties to disclose expert witnesses at the times directed by the court. Rule 702 provides in effect that, before the Court even considers relevance or reliability of an expert's opinion (the *Daubert* issue) or whether he can reasonably rely upon a report of another individual (the Rule 703 issue),

he must be qualified as an expert in that particular field. It is under these rules that Hitchner's report fails. Whether Plaintiffs can meet their burden of proof on unjust enrichment by basically waiting until after Reilly was disclosed and deposed and then having Hitchner rely upon Reilly's opinions on one hand while critiquing some parts on the other is not even an issue that needs to be reached in light of other deficiencies noted.

IV. ARGUMENT

Hitchner, Plaintiffs' clearly-denominated "rebuttal" expert, cannot be permitted to opine (as in a case-in-chief) on the unjust enrichment "true value" issue on which Plaintiffs bear the burden of proof against all Count IX defendants. In order to limit the length of this further Reply, Dickes would direct the Court back to his discussion at pp. 4-8 of his January 9, 2003 filing. He there discusses the caselaw supporting strict adherence to deadlines and the effect of failure to abide by them. Dickes also cited cases holding it is completely inappropriate to use untimely-disclosed experts, listed only as timely-disclosed "rebuttal" witnesses, to meet case-in-chief/burden of proof requirements. These rules are especially pertinent in the case at bar, where Plaintiffs are trying to use "rebuttal" testimony to presumably rebut what Dickes and other Count IX defendants did not even present. Since Dickes and these Defendants did not retain or disclose expert witnesses and/or reports, there is no expert testimony for Plaintiffs' reports to "rebut." Plaintiffs should therefore not be allowed to use any rebuttal report to defeat Dickes' Motion.

The cases Plaintiffs cited previously for considering their rebuttal experts in connection with all Count IX defense summary judgment motions are inapposite. Neither the *Ricker* nor *Modern Products* cases addressed expert reports not timely disclosed. They only addressed whether to permit certain other evidence to be placed into the record following the final brief on

the motions. In *Modern Products*, not only was the additional report not an untimely disclosed expert report, but it was not “outcome determinative” anyway. The court therefore felt there would be no prejudice in making it part of the record. The *Ricker* case similarly did not involve an untimely disclosed expert. Judge McDade simply permitted the plaintiff an additional period of time to file material after briefing had closed. While these cases show a court may on proper grounds allow supplementation of a summary judgment record, they do not support doing so with untimely disclosed opinion evidence.

Even if the Court were to consider Hitchner’s report as timely opinion evidence for Plaintiffs’ case-in-chief, on the actual value of the shares, it is still inadmissible. Only admissible evidence can aid in defeating a summary judgment motion. 11 Moore’s Federal Practice p. 56-162.1. However, running throughout Hitchner’s report are numerous references to sweepstakes risks. See e.g., Plaintiffs’ Ex. 932, pp. 8518, 8519, 8523, 8524, 8525, 8526, 8529-40, 8559, 8569, 8570, 8571, 8572. Hitchner’s references to value in paragraph 2e of Plaintiffs’ Sur-Reply are clearly interrelated with and dependent upon opinions regarding sweepstakes risks to the ongoing F&G operation. Yet Hitchner totally lacked expertise in this particular field, and whatever he might say on the subject is barred by Rule 702.

Hitchner never had any involvement with sweepstakes and had never opined on sweepstakes risks. (Hitchner Dep. p. 39). He did not know in 1995 or 1997 about them. (Hitchner Dep. pp. 39-40). No one on Hitchner’s team had any familiarity with sweepstakes issues. (Hitchner Dep. p. 44). Hitchner talked to no one on the outside with such familiarity either. (Hitchner Dep. pp. 44-45). He did not read the reports of certain defense experts regarding sweepstakes risks. (Hitchner Dep. p. 45). Hitchner testified he did not know if sweepstakes inquiries caused F&G’s demise. (Hitchner Dep. p. 59). Hitchner said he has no

experience or training in determining consumer behavior towards sweepstakes. (Hitchner Dep. p. 132). He did not consider himself an expert in sweepstakes. (Hitchner Dep. p. 133).

An expert's declaration alone does not get a case past a motion for summary judgment, for the court must look behind the ultimate conclusion and analyze the adequacy of its foundation. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.3d 1333, 1339 (7th Cir. 1989). The importance of safeguarding the integrity of the judicial process requires a trial judge, when he believes an expert's testimony does not meet governing standards, to say so. *Id.* at 1340. When an expert acknowledges a lack of expertise on a subject that is the primary underlying basis for his conclusions, the opinion is inadmissible. *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 724 (7th Cir. 1999). See also *Surace v. Caterpillar, Inc.*, 111 F.3d 1033, 1055 (3d Cir. 1987) (where an opinion "hinged" on a precept in an area in which the witness had no training and experience, it was not admissible); *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799-800 (4th Cir. 1989) (abuse of discretion to allow a witness to base an opinion upon information from an area in which he lacks expertise). Applying these precedents to the Hitchner report readily establishes both its inadmissibility and inability to raise a question of fact on the actual value of F&G shares.


For these reasons, this Court should specifically ignore the reference set forth in the first sentence of paragraph 2a of Plaintiffs' Sur-Reply. Hitchner is not qualified to opine on sweepstakes risks, let alone whether they were "known" or a "major threat." Reviewing Hitchner's report in light of his concessions made in his deposition also shows Plaintiffs have provided this Court with no real evidence, from their point of view, on the actual value of F&G shares. What Plaintiffs have belatedly thrown into the record, without qualification of Hitchner, is insufficient to defeat summary judgment.

Hitchner's report and the way it is presented here are especially noteworthy when one considers the "knew or should have known" test against Dickes. Many years after the events on which Plaintiffs predicate their Count IX liability case, they do not produce any direct evidence of actual value. They do not produce an opinion of someone qualified to render one, and even then the offered report is at best a derivative opinion based upon changing some of the assumptions and methods in Reilly's opinion offered on behalf of certain fiduciary defendants in this litigation. Instead of showing Dickes received more than adequate consideration, and he knew or should have known this, Plaintiffs simply attack the assumptions and conclusions of another valuation expert in this litigation. Plaintiffs point out alleged flaws in certain assumptions, in a technical area of business valuation, without any showing of what Dickes knew or should have known in December, 1995 and June, 1997. The manner in which Plaintiffs have, through "rebuttal" reports, tried to show in 2003 what share values were five and one-half and seven years ago only underscores how they have not established Dickes knew or should have known he was receiving more than adequate consideration in those transactions. There is no proof anywhere in the record that Dickes had the knowledge or clairvoyance to reject contemporaneous valuation opinions given by Houlihan and Valuometrics. Indeed, rather than rejecting those contemporaneous opinions, Dickes embraced them. He reinvested most of the proceeds from the 1995 sale of his shares back into shares of F&G at the same price for which he had sold them to the ESOP. See Dickes' Motion for Summary Judgment p. 28. With regard to the 1997 sale, Hitchner's opinion does not even address the fact that Dickes had a put to the company for \$18.62 per share. See Dickes' Motion for Summary Judgment pp. 28-29.

CONCLUSION

Plaintiffs have received another chance to save their case against Dickes and other Count IX Defendants. Nevertheless, there is nothing offered in Plaintiffs' Sur-Reply that permits, let alone compels, this Court to rule in their favor. Dickes' Motion for Summary Judgment should be granted.

LYLE T. DICKES, Defendant

By: 
HUSCH & EPPENBERGER, LLC

STEPHEN D. GAY
JEFFREY A. RYVA
HUSCH & EPPENBERGER, LLC
401 Main Street, Suite 1400
Peoria, Illinois 61602-1241
Telephone: (309) 637-4900

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

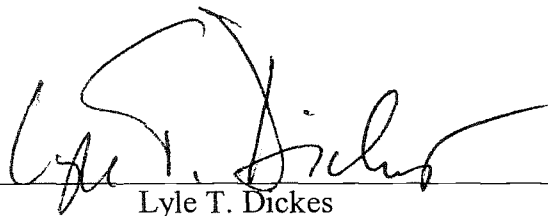
DEBRA K. KEACH and PATRICIA A. SAGE,)
)
Plaintiffs,)
)
vs.) CASE NO. 01-1168
)
U.S. TRUST COMPANY, N.A. f/k/a U.S. TRUST)
COMPANY OF CALIFORNIA, N.A., *et al.*,)
)
Defendants.)

SUPPLEMENTAL AFFIDAVIT OF LYLE T. DICKES

I, LYLE T. DICKES, having been first duly sworn, state as follows:

1. I am of legal age, under no disability, have personal knowledge of the matters set forth herein, and am competent to testify to the same if called in court as a witness.
2. On December 20, 1995, I believed each share of Foster & Gallagher stock was worth at least \$19.50 per share.
3. On June 30, 1997, I believed each share of Foster & Gallagher stock was worth at least \$18.62 per share.
4. At the time of both ESOP transactions at issue in this case, I believed that the prices paid were appropriate and had no reason to believe otherwise.

Further Affiant sayeth not.



Lyle T. Dickes

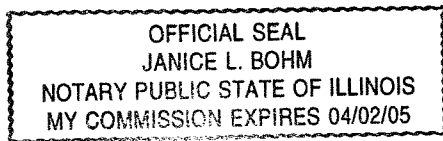
STATE OF ILLINOIS)
COUNTY OF PEORIA) ss.

I certify that LYLE T. DICKES, known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day and acknowledged that he signed and delivered it, as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal this 31st day of January, 2003.

Janice L. Bohm

Notary Public



STEPHEN D. GAY
JEFFREY ALAN RYVA
HUSCH & EPPENBERGER, LLC
401 Main Street, Suite 1400
Peoria, Illinois 61602-1241
Telephone: (309) 637-4900

PROOF OF SERVICE

Under penalties as provided by law pursuant to 28 U.S.C. Section 1746, I hereby certify that I served the foregoing **RESPONSE OF LYLE T. DICKES TO PLAINTIFFS' CONSOLIDATED SUR-REPLY TO SUMMARY JUDGMENT MOTIONS** upon the parties of record by enclosing a copy of same in envelopes addressed as follows:

Dean B. Rhoads, Esq.
Edward F. Sutkowski, Esq.
Sean M. Anderson, Esq.
Robert H. Rhode, Esq.
Steven P. Oates, Esq.
SUTKOWSKI & RHODE LTD.
124 S.W. Adams Street, Suite 560
Peoria, IL 61602

Thomas A. Bloom
Senior Investigator
U.S. DEPARTMENT OF LABOR
Pension & Welfare Benefits Administration
Ft. Wright Executive Building
1885 Dixie Highway, Suite 210
Ft. Wright, KY 41011-2664

James W. Springer, Esq.
Charles G. Roth, Esq.
KAVANAGH, SCULLY, SUDOW, WHITE
& FREDERICK, P.C.
301 S.W. Adams Street, Suite 700
Peoria, IL 61602

Bradley M. Jones, Esq.
Richard L. Pemberton, Esq.
MEAGHER & GEER
4200 Multifoods Tower
33 South 6th Street
Minneapolis, MN 55402

Timothy L. Bertschy, Esq.
HEYL, ROYSTER, VOELKER & ALLEN, P.C.
124 S.W. Adams Street, Suite 600
Peoria, IL 61602

Robert N. Eccles, Esq.
Shannon M. Barrett, Esq.
Paul S. Horwitz, Esq.
Ira H. Rafaelson, Esq.
Brian P. Brooks, Esq.
O'MELVENY & MYERS, LLP
555 13th Street NW, Suite 500W
Washington, DC 20004-1109

Mark A. Casciari, Esq.
Sari Alamuddin, Esq.
Ian H. Morrison, Esq.
SEYFARTH SHAW
55 East Monroe Street, Suite 4200
Chicago, IL 60603-5803

Robert M. Riffle, Esq.
John S. Elias, Esq.
Cynthia L. Elias, Esq.
ELIAS, MEGINNES, RIFFLE & SEGHETTI
416 Main Street, Suite 1400
Peoria, IL 61602

Michael T. Graham, Esq.
Nancy G. Ross, Esq.
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606

Dean R. Essig
Attorney at Law
135 Washington Square
Washington, IL 61571

James C. Bailey, Esq.,
Paul J. Ondraski, Jr., Esq.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Roy G. Davis, Esq.
David G. Lubben, Esq.
DAVIS & CAMPBELL LLC
401 Main Street, Suite 1600
Peoria, IL 61602

L. Lee Smith, Esq.
HINSHAW & CULBERTSON
298 Twin Towers Plaza
456 Fulton Street
Peoria, IL 61602

John J. Weltman, Esq.
LAWSON & WEITZEN, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210-2414

Jeffrey B. Rock, Esq.
HASSELBERG, ROCK, BELL & KUPPLER
4600 N. Brandywine Drive
Peoria, IL 61614

Richard J. Pautler, Esq.
THOMPSON COBURN LLP
One Firststar Plaza, 34th Floor
St. Louis, MO 63101

Dale Fujimoto
6840 Blythefield Avenue N.E.
Rockford, MI 49341

W. Thomas Stumb
919 Thornapple River Drive
Grand Rapids, MI 49546

and by depositing said envelopes with first-class postage fully prepaid in the United States mail
at Peoria, Illinois, on this 31st day of January, 2003.